



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

SEP 21 1990

The Honorable Tommy G. Thompson
Governor, State of Wisconsin
Room 115 East
State Capitol
P.O. Box 7863
Madison, Wisconsin 53707

Dear Governor Thompson,

This letter is in response to your letter of August 30, 1990, to Secretary Cavazos. You have asked for a Department opinion on the applicability of Part B of the Education of the Handicapped Act, 20 U.S.C. 1401 et seq. (EHA-B), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), to the Milwaukee Parental Choice Program (Choice Program).

We have reviewed Wisconsin Statute, Section 228.119.23, "Milwaukee Parental Choice Program," to determine whether and to what extent the EHA-B and Section 504 apply. In brief, the Choice Program provides that up to 1000 low-income pupils, grades K-12, who reside in Milwaukee may attend, at no charge, participating nonsectarian private schools. The pupils, or their parents, who wish to participate in this program apply directly to the private school of their choice; participating private schools must accept Choice Program students on a random basis. The State Department of Education (SEA) pays to the private school the funds it would have provided to Milwaukee, approximately \$2500 per pupil. Our understanding is that all funds paid to the schools are State, rather than Federal, funds.

The Department has determined that the EHA-B public placement requirements do not apply to placements in private schools resulting from parents' decisions to participate in the Choice Program, as long as a free appropriate public education (FAPE) is available to each handicapped child in the public school. Because it is the parent's decision to participate in the Choice Program, handicapped children in this program are "private school handicapped children" under the EHA-B and as such are not entitled to a FAPE. See 34 C.F.R. 300.450. These children are still eligible for any "equitable services" that may

The Honorable Tommy G. Thompson - page 2

be available to them, in the same manner as other handicapped children enrolled in participating or nonparticipating private schools. See 34 C.F.R. 300.403 and 76.650-.662. In addition, it should be noted that the Milwaukee public schools must always be able to make FAPE available for all children with handicaps in its jurisdiction, if the parents decide to opt out of the Choice Program.

Section 504 does not directly apply to the private schools, assuming that the State is using State and not Federal money to fund the placements. In the language of the regulations, the private schools are not "recipients" of Federal funds and their programs and activities are not federally-assisted based on their participation in the Choice Program. This means that the schools are not required, among other things, to file assurances directly with the Department; nor would their employment practices be covered, solely because of their participation in the Choice Program. See 34 C.F.R. Part 104, Subpart B. However, because the SEA receives Federal financial assistance, pursuant to the Civil Rights Restoration Act of 1987, Section 504 covers all of the SEA's operations, including the administration of the Choice Program. The SEA must ensure that participating private schools satisfy Section 504 with respect to handicapped children who wish to participate in the Choice Program. The standard that the SEA must apply to the private schools that participate in the Choice Program is that they cannot exclude a handicapped student "if the person can, with minor adjustments, be provided an appropriate education within the school's program." 34 C.F.R. 104.39(a).^{1/} In other words, under Section 504 the private schools are "not required to provide an appropriate education to handicapped students with special educational needs" where the schools do not offer programs designed to meet their needs. See 34 C.F.R. Part 104, App. A at 28.

In conclusion, although the EHA-B FAPE provisions do not apply to the children participating in this program, under Section 504, a handicapped student cannot be excluded from any

^{1/} The Section 504 regulations define an "appropriate education" as:

the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 C.F.R. 104.33(b)(1). Sections 34 C.F.R. 104.34 -.36 address evaluation, placement with nonhandicapped children to the maximum extent appropriate, and procedural safeguards.

The Honorable Tommy G. Thompson - page 3

school participating in the Choice Program if that student can, with minor adjustments, be provided an appropriate education within the school's program. In addition, under EHA-B, participating handicapped children are still eligible for any "equitable services" that may be available to them, in the same manner as other handicapped children enrolled in participating or nonparticipating private schools.

We hope that you find this information helpful. If you have any questions, please do not hesitate to contact us.

Sincerely,



Robert R. Davila
Assistant Secretary
Office of Special Education
and Rehabilitative Services



Michael Williams
Assistant Secretary
Office for Civil Rights